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In The

Supreme Court of the United States

October Term, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

v.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

On Petition For Writ Of Certiorari To The
Court of Appeals of Maryland

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opposition To Petition For Writ of Certiorari

RESPONDENT'S STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case except as set forth below.

The Joseph H. Munson Company, Inc. (Munson) is an Indiana corporation engaged in the business of advising organizations which desire to raise funds through entertainment and other social events, and of promoting and conducting such events. For these services, Munson receives a percentage of the total amount of receipts from a given event.

Munson provides a complete service to its client organizations. After being advised by Munson of the options available for raising funds, an organization chooses the event it favors the most. Munson then contracts for the entertainment (or other focus of the event), the location, the necessary materials and supplies, etc.; in other words, all of the details of the fundraising activity.

In the State of Maryland, Munson's sole clients are the various chapters of the Fraternal Order of Police. This organization has as its purpose the furtherance of the economic, professional and social well-being of its member officers through activities that disseminate information about, and advance the cause of, issues considered important to police officers as a group.

The contracts between Munson and the various chapters provide for payments to Munson in excess of the amounts permitted under the Maryland statute. Consequently, Munson has been informed that the chapters will cease contracting for fundraising activities with the company for fear of criminal sanctions being taken against them by the State.

The provisions of the Maryland statute are generally enforced by the State government. Officials of the State have contacted Munson and its counsel to inform them that the failure to adhere to the provisions of §103D would result in the State filing criminal charges for the violations.

In response to these events, Respondent Munson brought an action for declaratory and injunctive relief against the Secretary of State of Maryland, the officer charged with enforcement of the statute at issue, in March of 1978. An amended complaint was filed in May of 1980, said complaint being the first allegation by Respondent of any federal constitutional claims. The trial of the case was upon this amended complaint. Respondent's arguments and claims are the same as were made at trial, to the Court of Special Appeals, to the Court of Appeals, and to this Court.

REASONS AGAINST GRANTING REVIEW

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY POWER TO ISSUE A WRIT OF CERTIORARI FOR REVIEW OF THIS CASE FOR THE REASON THAT THE DECISION AND OPINION BELOW IS IN STRICT CONFORMITY WITH THE DICTATES OF *SCHAUMBERG*, AND IS THEREFORE CORRECTLY DECIDED.

The Court of Appeals of Maryland, in an opinion filed August 5, 1982, held that Article 41, section 103D of the Annotated Code of Maryland, 1957 (1978 Repl. Vol.) is unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The court found that although the Maryland statute differed in minor respects from the statute at bar in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980), it was, nevertheless, a clear infringement on First Amendment interests and therefore could not pass constitutional muster as established by this Court in *Schaumburg*. Since the decision below is in strict conformity with the case law of this Court as represented by *Schaumburg*, the result is correct as a matter of Federal constitutional law and there is no reason for further review by this Court.

Petitioner argues that the Maryland statute is so different from the Illinois statute, that the former is constitutional even though the latter has been declared invalid. Respondent contends, and the Court of Appeals of Maryland held, that the minor differences in the detail of the statutes do not result in any difference in the effect on protected speech interests, and therefore, the Maryland statute is unconstitutional. For the reasons set forth below, it is our contention that *Schaumburg* is dispositive of this cause, and we urge this Court not to issue a writ of certiorari for its review.

The relevant differences between the Maryland and Illinois laws are: first, the *Schaumburg* ordinance was limited to door-to-door solicitation, while §103D covers *all* fundraising; second, the Maryland statute apparently does not "bar" organizations previously exceeding the limit from future soliciting, but instead subjects those organizations to criminal sanctions, while the *Schaumburg* ordinance would deny a permit to such organizations; and, third, §103D provides that Petitioner may exempt organizations from the percentage limitation ("...where the 25% limitation would effectively prevent the charitable organization from raising contributions"), while the *Schaumburg* ordinance had no exceptions.

The first two differences are inconsequential to this Petition. The greater coverage of the Maryland statute makes it an even greater infringement on protected interests than was the Illinois law. *(Pet. App.* 16a).[1] As for the second difference, Petitioner cites it as proof of a lack of "prior restraint" in the Maryland statute. *Petition* at 21. This argument begs the question before the Court. If, as Respondent contends, §103D is an unconstitutional infringement on protected interests, it matters little that in Maryland one can continue to solicit in violation of the statute, since such activity would expose that person to criminal sanctions for First Amendment activity. Regardless of the particular regulatory scheme at bar, this Court has never failed to hold invalid any statute or regulation that, on its face, establishes criminal sanctions for constitutionally protected conduct.

This leaves the only relevant difference between the *Schaumburg* decision and the instant case—the exemption power contained in §103D. (See *Petition* at 3 for text). Upon examination of that power, it is apparent that the Maryland statute is constitutionally indistinguishable from the *Schaumburg* ordinance, and therefore was properly invalidated by the court below.

Respondent's primary argument, made at trial and to both courts of appeal, is that the groups identified as protected by this Court in *Schaumburg*, 444 U.S. at 633-34, must be excluded from the sweep of the Maryland statute in order to make that statute constitutional.[2] Clearly, without the exemption power, the Maryland statute is exactly the statute struck down in *Schaumburg*. And the exception, by its own terms, is so narrow and specific that it cannot possibly include within its scope all protected organizations.

[1]Since the Petitioner has provided all necessary material in the Appendix to the Petition, Respondent will refer to parts of that appendix as "*Pet. App.* ____," as is done here, and refer to parts of the Petition itself as "*Petition at* ____."

[2]This Court noted that "conduit" type organizations (e.g., the United Way) might be constitutionally regulated by a percentage scheme. 444 U.S. at 635.

The exception gives the Secretary the ability to waive the 25 percent limitation only when an organization is "effectively prevented" from raising contributions. Nothing in the exemption power as written would help a protected organization (as defined in *Schaumburg*) which was not "effectively prevented" from raising *any* contributions, but which felt that the information and views it supported would be communicated better or to more citizens by the use of a more expensive fundraising activity. Under such circumstances, the activity chosen as best by the organization would be effectively vetoed by the hanging threat of criminal prosecution for violating §103D, while the power to grant an exemption would be unavailable since contributions *could* be raised by other, less desirable (from a "dissemination of information" standpoint) but cheaper methods.

Therefore, the Maryland Court of Appeals correctly concluded that ". . .the limited provision in §103D. . .does not save the section under the *Schaumburg* opinion." *Pet.App.* 21a (footnote omitted).

While considering *Schaumburg* to be dispositive of the issues in the case, Respondent also urged upon all three lower courts an alternative analysis based upon the equally serious constitutional infirmity of "local discretion."[3] Such an argument was alluded to in *Schaumburg*, but left undecided, because the statute at bar in that case provided no exception to the 25 percent limitation. Respondent correctly feared that the mention of a "flexible statute" case, *National Foundation* v. *Fort Worth*, 415 F.2d 41 (5th Cir. 1969), *cert.den.*, 396 U.S. 1040 (1970), in the *Schaumburg* opinion as an "alternative" to a fixed percentage limitation would be misinterpreted as an approval of an exception power such as the one contained in §103D. See 444 U.S. at 635.

[3]The Secretary incorrectly states in her Petition that Respondent raised the local discretion—vagueness issue only in the Court of Appeals. *Petition* at 16. In fact, Respondent has made this argument in each of the three courts below; only the Court of Appeals has been willing to address the issue in its opinion. *Pet.App.* 20a.

Respondent is confident in labeling such an inference of approval as incorrect. Since the only issue before the *Schaumburg* Court was overbreadth, the reference to the flexible *Fort Worth* statute was correct—a truly "flexible" statute would permit more protected groups to exercise their rights, i.e., it would not be *as* overbroad. What was not addressed, because the issue was not before the *Schaumburg* Court[4], was whether such a flexible statute would so far rely on official discretion as to render it unconstitutionally vague under *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976)[5]. See *Schaumburg*, 444 U.S. at 642-643 (Rehnquist, J., dissenting).

The problem with the waiver feature as an answer to the objection of overbreadth is that there is nothing in the Maryland statute that indicates that each group in the class identified as "protected" under *Schaumburg* is entitled to the waiver. In other words, it is no answer to trade away overbreadth for excessive discretion and vagueness. Furthermore, it is the mere existence of this discretion, not its abuse, that results in a "continuous and pervasive restraint" on protected activity. *Thornhill* v. *Alabama*, 310 U.S. 88, 97 (1940).

Therefore, Respondent contends that even assuming arguendo that the narrow, limited exception contained in §103D was suddenly judicially rewritten into a full-fledged *Fort Worth*-type flexible percentage statute, such a statute would itself be objectionable as placing excessive discretion in the hands of the enforcement officer (the Secretary of State). Since the decision below was in accord with the principles of both *Schaumburg* and *Hynes* (and their progeny), review of this cause by certiorari is unnecessary, and Respondent urges that the Petition be denied.

II. THIS COURT SHOULD NOT REVIEW A CASE SUCH AS THIS IN WHICH THE MAJOR ISSUE WAS ONE OF STATE STATUTORY INTERPRETA-

[4]It is axiomatic that this Court will not decide issues not necessary to the resolution of the case before it.

[5]"Vagueness" is a term that includes "local discretion" as one type of vagueness. A statute with excessive local discretion means that the statute is vague to the enforcement authorities, resulting in less than consistent application and enforcement.

TION, AND THAT INTERPRETATION, BY THE HIGHEST COURT OF THE STATE, RESULTED IN THE INVALIDATION OF THAT STATUTE AS VIOLATING THE UNITED STATES CONSTITUTION.

The first question presented for review by Petitioner far exceeds the actual issues raised in this cause. Notwithstanding the Petitioner's statement ". . .the Maryland court created a *per se* rule that would effectively invalidate any percentage limitation in a charitable solicitation law. . ." (*Petition* at 18), the Court of Appeals of Maryland's opinion hardly calls for such alarm. The basis of the decision and opinion was the judicial interpretation of §103D by the highest court of the state, and that interpretation concluded, as Respondent has consistently argued, that the limited and narrow waiver provision of the Maryland statute is plainly insufficient to constitutionally distinguish §103D from the *Schaumburg* statute.

The Maryland court held that, like *Schaumburg*, the statute substantially infringes on First Amendment freedoms, but was no more substantially related to asserted state interests, nor was any less drastic in its means to effect those interests, than was the Illinois law. *Pet.App.* 13a-21a. There is no support anywhere in the opinion for the assertion that the Maryland court read *Schaumburg* as a *per se* invalidation of percentage limitation regulation.

The opinion, therefore, makes no new law, or decides any point of law in conflict with the applicable decisions of this Court. The court below simply interpreted a state statute, and applied the analysis set forth by the *Schaumburg* Court. The interpretation of a state statute by the highest court of a state is entitled to some measure of deference in this Court, and the interpretation given by the Court of Appeals of Maryland made the issue in this case merely one of straightforward application of *Schaumburg*.

While it may be true that *Schaumburg* left undecided the question of whether *any* percentage limitation statute could pass constitutional muster, resolution of this issue is not necessary for the resolution of the case at bar. Therefore, the discretionary review of this case by writ of certiorari is unnecessary, and the Petition should be denied.

The second question presented for review again tries to make "prior restraint" an issue material to the resolution of this case. As noted earlier, even if an organization may register without compliance, or apply for waiver after noncompliance, the fact remains that if a protected organization exceeds the percentage limit, it is subject to criminal prosecution for activity protected by the First Amendment. *Schaumburg*, 444 U.S. at 632.

The Maryland court responded to the "prior restraint" argument by stating that the minor difference between the Maryland and Illinois statutes in their method of enforcement ". . .is purely a semantic one." *Pet. App.* 17a-18a. In addition, the court below found that ". . .there is no merit in the distinction drawn by the Secretary between 'prior restraint' of a form of speech and criminal sanctions for engaging in a form of speech." *Pet. App.* 18a-19a.

Since Petitioner's "prior restraint" argument adds nothing to the *Schaumburg* analysis, the review of such an argument by way of certiorari is unnecessary and such a writ should not be granted.

III. THIS COURT SHOULD NOT REVIEW A CASE FOR THE SOLE REASON THAT LOWER COURTS HAVE DIFFERED IN THE APPLICATION OF *SCHAUMBURG*, SINCE IT IS CLEAR THAT THE SPECIFIC PROVISIONS OF EACH STATUTE, AS INTERPRETED BY THE COURTS, ARE DISPOSITIVE OF THE MERITS; FURTHERMORE, EVEN IF THERE ARE DIFFERING INTERPRETATIONS

(RATHER THAN APPLICATIONS) OF *SCHAUMBURG*, NONE OF THE ISSUES LEFT UNDECIDED BY THIS COURT COULD BE SETTLED UPON REVIEW OF THIS CASE SINCE THEY ARE NOT NECESSARY TO ITS RESOLUTION.

Petitioner contends that review by this Court is necessary to correct the "...deep division as to the proper interpretation and true effect of [the *Schaumburg*] decision." *Petition* at 24. Such an argument would be well taken if in fact such a "deep division" existed. However, the various cases cited by Petitioner as support for this assertion prove only that the variety of statutes and regulatory schemes that have been dealt with by the lower courts is limitless, as it should be.

Each of the cited cases falls for or against constitutionality based not upon a national misunderstanding of *Schaumburg*, but because each court is faced with a different statutory scheme. As noted in Section II, a large part of a court's job in evaluating the validity of a statute is its interpretation of what the statute actually means. Once that is done, the case law is relatively simple to apply; the *Schaumburg* opinion is quite clear in its mandate.

Furthermore, even if there is a true division of interpretation among the state and federal courts of appeal, Respondent contends that for the reasons set forth below and in Section II, this case is an inappropriate vehicle for the refinement of *Schaumburg* by this Court.

The interpretation of the §103D waiver provision as constitutionally insufficient to distinguish the statute from *Schaumburg* would make any review of this case a mere rehearing of *Schaumburg*. The issues raised by the State would be unnecessary to the resolution of the case, and therefore, would not be addressed by this Court.

In light of the facts and circumstances of the instant case, even if there exists conflicts among the lower courts as to the meaning of *Schaumburg*, review of this case by this Court would not resolve those conflicts, and therefore, review on such a basis should not be granted.

IV. THIS COURT SHOULD NOT REVIEW THE ISSUE OF STANDING, SINCE RESPONDENT HAS SUFFERED INJURY IN FACT, AND HAS THE RIGHT TO RAISE THE CONSTITUTIONAL RIGHTS OF PARTIES NOT BEFORE THIS COURT UNDER THE APPLICABLE DECISIONS OF THIS COURT, INCLUDING *SCHAUMBURG*.

Respondent strongly disagrees with Petitioner's characterization of its standing to challenge §103D as ". . .an unthinking and unwarranted departure from traditional rules of standing. . ." *Petition* at 28. In fact, a denial of standing to challenge the statute would be a decision ". . .clearly at odds with decisions of this Court." *Id.* In support of this contention, Respondent will briefly set forth the basis of its standing to challenge §103D.

The minimum standing requirement under Article III of the Federal constitution is that there be "injury in fact"; that is, some showing that the party challenging the statute is actually injured by its operation. *Barrows* v. *Jackson*, 346 U.S. 249 (1953). In the case at bar, it was stipulated that Respondent has lost and will lose business because its clients, the Fraternal Orders of Police, are reluctant to contract with Respondent for fear of being exposed to criminal liability. This result is not surprising, since it is a crime under §103D to "pay or agree to pay," as expenses, amounts in excess of those permitted. It was also stipulated that Respondent's contracts call for such a fee.

Such an injury is clearly sufficient under Article III to establish a "case or controversy." There is clear economic injury plainly caused by the operation of the statute, and therefore Respondent meets the first test of standing.

The second test is more complicated to state, but has an equally simple resolution in this case. Although ordinarily a party cannot raise the constitutional rights of others not before the Court, it may do so under either of the two exceptions to the general rule: (1) the exception for parties challenging the facial invalidity of a statute on First Amendment grounds, and (2) the so-called *jus tertii* exception based upon the relationship between the litigant's activity and the third party rights sought to be asserted.

A full exposition of the basis of the "overbreadth" standing exception is unnecessary to the disposition of the Petition before this Court. It will suffice to point out that the overbreadth standing granted to the litigant in *Schaumburg* is equally available to the Respondent in this case, as is the analysis in support thereof.

As an alternative ground, Respondent claims standing based upon the possibility of dilution or adverse effect upon the constitutional rights of the Fraternal Orders of Police. If the methods of fundraising deemed most appropriate to the advancement of their chosen issues are closed off by the fear that they will exceed a spending limitation, then there is a real and substantial effect upon their rights that is inextricably "bound up" with the activity Respondent wishes to pursue. See *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976). In such cases, this Court allows the third party's rights to be vicariously asserted. See *Craig* v. *Boren*, 429 U.S. 190 (1976), and *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1924).

Respondent has established both injury in fact, and two distinct grounds for the assertion of the constitutional rights of parties not before the Court. Respondent therefore has standing to challenge §103D, and to raise in support of that challenge the rights of the class of groups identified in *Schaumburg* as protected from overbroad regulation of fundraising expenses. This Court need not grant review of this case on the basis of a challenge to Respondent's standing.

CONCLUSION

Before this Court is the question of whether to exercise its discretionary power to further review the case at bar by the issuance of a writ of certiorari. Petitioner has raised several important questions that might have been left undecided by this Court in the *Schaumburg* opinion, and asserts that the Court should review this case to answer those questions. However, it is clear from the facts of this case, and from the opinions below, that those questions are not at all necessary to the correct disposition of this case.

Petitioner has also contested the Maryland court's interpretation of the waiver provision as insufficient to save it from overbreadth. The Secretary now asks this Court to review the authoritative construction of a state statute by the highest court of the state because it is a misinterpretation of *Schaumburg*. It is clear, however, that the application of *Schaumburg* by the court below was correct; what Petitioner is really contesting is the interpretation of the waiver power by the Maryland court. Such an issue is not a valid reason for the issuance of a writ.

Finally, Petitioner attacks Respondent's standing to challenge the Maryland statute. No basis for review will be found in this issue, since it is beyond question that Respondent meets the dual test for standing, and therefore may challenge the statute at issue.

For the reasons set forth herein, Respondent respectfully suggests to this court that the review of the instant case by the issuance of a writ of certiorari would be an unwarranted exercise of discretion, and therefore the Petition of the Secretary of State of Maryland should be denied.

Respectfully submitted,

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